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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	
	)	
and	)	CC Docket No. 96-149
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

COMMENTS OF BELL ATLANTIC

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COMMENTS OF BELL ATLANTIC[1]

I. Introduction and Summary

These proceedings cover two very separate groups of proposals. On one hand, the Commission proposes to overlay an extensive body of regulations on top of the requirements of Section 272 of the 1996 Act of 1996. Given the detailed requirements of the Act itself, the proposed rules are at best unnecessary, and in several respects, affirmatively harmful to competition and consumers alike. If the rules are adopted at all, they should be modified as described below to minimize their harmful impact.

On the other hand the Commission asks whether Bell operating company ("BOC") affiliates that provide in-region long distance service should be treated as nondominant. The

[1] This filing is on behalf of Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc., and Bell Atlantic Communications, Inc.

answer is straightforward. The major incumbents that together control the preponderance of the long distance market already are regulated as nondominant, and there is no justification for regulating new entrants more harshly. By promptly declaring the BOCs' long distance affiliates non-dominant, the Commission will take an important step forward toward delivering consumers the benefits of additional long distance competition.

II. Section 272 Already Contains Detailed Requirements and Additional Implementing Regulations Are Not Needed.

Section 272 of the 1996 Act requires BOCs that provide in-region long distance services or engage in manufacturing to temporarily provide those services through a separate affiliate. The detailed provisions of the Act itself "spell out the structural and transactional requirements that apply to the separate subsidiary,"[2] and the requirements in section 272 are themselves "quite precise."[3] In fact, the provisions of the Act and are actually more detailed than analogous rules the Commission has adopted in similar contexts.[4] Under these circumstances, there is simply no need for a whole new scheme of regulations to implement the non-accounting provisions of section 272 at issue in this proceeding.

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[2] See Joint Explanatory Statement at 150 (explanation of section 252 of the Senate Bill, which as amended, became section 272 of the Act) (rel. Jan. 31, 1996).

[3] The Commission has recognized that there is no need for regulations with rules of similar precision. ***See Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services***, CC Docket No. 96-152, Notice of Proposed Rulemaking, ¶ 43 (rel. July 18, 1996).

[4] For example the Commission's rules concerning separation requirements for enhanced services providers (§ 64.702) or cellular service (§ 22.903), have less detail than the section 272 rules.

Nor did Congress contemplate that supplementary regulations would be adopted. Section 272 is quite specific in indicating where rulemakings are required, and the only references to Commission rules are in section 272(b)(2) and (c)(2) -- both of which relate to accounting safeguards that are to be addressed in a separate docket. Nothing in the language of section 272 invites the Commission to adopt rules implementing the non-accounting provisions at issue here. On the contrary, the Senate bill did require such a rulemaking, but that authorization was removed in conference.[5]

Moreover, the Commission's proposal to adopt rules governing purely ***intra***state interLATA services exceeds its jurisdiction. Section 2(b) of the Act expressly denies jurisdiction to the Commission over any intrastate services. As the Supreme Court made clear in ***Louisiana Public Service Comm'n v. FCC***, absent a specific grant of authority to preempt state jurisdiction elsewhere in the Act, the express limitations of section 2(b) serves as a barrier to Commission jurisdiction.[6] Here, there is nothing in section 272 that expressly overrides section 2(b), and the Commission simply lacks jurisdiction over intrastate services.

III. At a Minimum, The Commission's Proposals Must Be Modified To Minimize Their Harmful Impact On Competition and Consumers.

Despite the detailed provisions of section 272, the notice here proposes a number of regulations that go well beyond the requirements of the Act. In fact, the notice not only proposes to import requirements from the abandoned Computer II rules that Congress presumably was

[5] ***See*** Telecommunications Act of 1996 Conference Report, Joint Explanatory Statement of the Committee of Conference, New Section 272, Senate Bill (Jan. 31, 1996).

[6] 476 U.S. 355, 374 (1986).

aware of and chose not to include in the Act, but in some respects proposes requirements that are actually more onerous than even the Computer II rules. This not only contradicts choices already made by Congress, but will hamstring new entrants into the long distance market with unnecessary burdens and impose added costs that ultimately must be borne by consumers. In fact, as Dr. William Taylor estimates in his accompanying affidavit, just one of the notices proposed additions to the Act's requirements could result in as much as a 15 percent increase in costs. To avoid these harmful impacts, the Commission, at a minimum, should modify its proposed rules in the respects identified below and in the accompanying attachment.[7]

a. First, contrary to the suggestion in the notice, the requirement in Section 272(b)(1) that the separate affiliate "operate independently" from the BOC does not require the Commission to adopt regulatory constraints beyond those included in the Act. On the contrary, the Commission has used this same language in its own rules in similar contexts, [8] yet has not deemed it necessary to adopt a whole new body of regulations to give effect to this relatively straightforward requirement. This is all the more true here, since section 272(b)(1) is immediately followed by other specific statutory requirements that give additional context and substance to the operate independently requirement.[9]

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7 Exhibit 1 to these comments addresses a number of additional concerns raised by the Commission's notice, and Exhibit 2 is a supporting affidavit by Dr. William Taylor ("Taylor Affidavit"). In addition, the Commission's Notice is replete with questions as to whether additional FCC regulations are required to interpret or enforce various provisions in section 272. The answer to each of these questions is no.

8 ***See, e.g.***, 47 C.F.R. § 64.702(c)(2) (enhanced services); 47 C.F.R. § 22.903(b) (cellular service).

9 ***See*** 47 U.S.C. § § 272(b)(2) - (5).

Moreover, to the extent the Commission proposes to rely on section 272(b)(1) as a basis for importing additional requirements from the Competitive Carrier proceeding or from its Computer II rules, its proposals run directly contrary to the Act. In adopting section 272, Congress deliberately chose the specific separation requirements that a BOC would be required to comply with. Congress obviously could have chosen to include other requirements, but chose not to. Section 272(b)(1) is not an invitation for the Commission to make that judgment anew, and does not authorize the Commission to pick and choose additional requirements that appear nowhere in the statute.

b. Second, neither section 272(b)(1) nor any other provision of the Act allows the Commission to apply section 272's separation requirements to other affiliates of the BOCs, including their existing service affiliates. On the contrary, by its express terms, section 272 applies only to the relationship between the named Bell operating companies -- i.e., the local exchange companies -- and their section 272 affiliates. Moreover, the Act limits the definition of a BOC to the named Bell operating companies and their successors and assigns,[10] a definition the Commission has embraced here,[11] and expressly excludes other affiliates.[12] As a result, section 272 by its very terms does not apply to an affiliate of a BOC that provides administrative services to both a BOC and to the BOC's section 272 or other affiliates.

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10 *See* 47 U.S.C. § 153(4)(A) and (B).

11 272 Notice, ¶ 1, n.3.

12 47 U.S.C. § 153(4)(C). Although section 272 itself does cover a BOC affiliate that is subject to section 251(c), 47 U.S.C. § 272(a)(1), that section applies only incumbent local exchange carriers and cannot be extended to other affiliates that do not operate as a local exchange carrier.

Not only would extending the reach of 272 to service organizations or other non-272 affiliates violate the Act, it also makes no sense from a practical or policy perspective. From a practical perspective, it makes no sense to suggest that accountants, lawyers or other administrative staff employed by a service affiliate should be required to make their services available to all comers, as a literal interpretation of the Commission's proposals would require. From a policy perspective, the economies of scope of allowing a single affiliate to provide administrative services to both the BOC and the 272 affiliates will serve to reduce the cost of both local and long distance service.[13] As a result, consumers of both services benefit from lower prices and more robust competition. In contrast, applying the section 272 separation requirements to the BOCs' service affiliates would increase the cost of both local and long distance service. It would do so, moreover, to the detriment not only of the BOCs, who must compete with long distance carriers are others who are free to use a single service organization to support their local and long distance services, but of consumers as well.

c. Third, the Commission likewise cannot interpret section 272(b)(3) -- which requires the section 272 affiliate to have separate officers, directors and employees from the BOC -- to prohibit the sharing not just of personnel but of services as well. Specifically, the notice proposes to ban the sharing of any "in-house functions" -- by which the notice appears to mean any administrative or support services that the BOC and section 272 affiliate might provide to one another -- including even the administrative services that could be shared under the onerous

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13 *See* Taylor Affidavit, ¶¶ 5-8.

Computer II rules.[14] Incredibly, the notice even goes so far as to ask whether outside service contractors -- which are neither employees of the BOC nor its affiliate -- would somehow become subject to the requirement that they not share common employees.[15]

In reality, this proposal simply cannot be squared with the language of the Act or the Commission's own prior decisions. Indeed, Section 272 itself repeatedly makes clear that a BOC and its separate affiliate may provide a variety of services directly to one another, subject to the specific requirements established by the Act.[16] Moreover, as a policy matter, requiring the BOC and its section 272 affiliate to duplicate the same functions would merely serve to increase costs unnecessarily. In fact, Dr. Taylor estimates in his accompanying affidavit that this single proposal could increase costs by as much as 15 percent, all to the ultimate detriment of consumers.[17]

d. Fourth, section 272's separation requirements cannot be interpreted to apply to an affiliate that serves as a common sales channel for the BOC and its 272 or other affiliates. While the notice suggests that "any transfer by a BOC of existing network capabilities of its local exchange entity to its affiliates is prohibited by section 272(a),"[18] this in no way changes the

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14 272 Notice, ¶ 62.

15 ***Id.***

16 ***See*** 47 U.S.C. §§ 272(b)(5) (transactions between affiliate and BOC must be on an arms length basis), 272(c)(1) (BOC in dealing with affiliate may not discriminate in the provision or procurement of goods, services, facilities or information), 272(c)(2) (BOC shall account for all transactions with 272 affiliate in accordance with principles approved by the Commission), 272(e) (various nondiscrimination requirements concerning the provision by the BOC to the affiliate of interLATA and intraLATA services and facilities).

17 Taylor Affidavit, ¶8.

18 272 Notice, ¶ 70.

conclusion. In the first place, section 272 simply does not apply to transactions between a BOC and its non-272 affiliates, and, in the case of an affiliate merely acting as a sales channel, there would be no transfer of "network capabilities" in any event. In addition, the sales channel cannot be considered to be a BOC, and therefore subject to the requirement that it be separate from the long distance affiliate, unless it acts as a LEC, or is a successor or assign of the BOC. But if the affiliate is only operating as a sales channel of the BOC, and the BOC continues to operate as the incumbent LEC, none of the restrictions of section 272 can apply.[19]

IV. Section 272 Cannot be Interpreted to Restrict the Right of BOCs and Their Affiliates to Jointly Market Inter- and IntraLATA Services.

Section 272 (g) of the Act expressly permits a BOC's long distance affiliate to market and sell local service obtained from the BOC along with its own long distance (so long as other long distance carriers have that same option).[20] It also permits a BOC itself to "market or sell" its affiliate's long distance service once the affiliate has received approval to provide the service under section 271.[21] Moreover, the right to joint market specifically overrides the nondiscrimination requirements of section 272(c).[22] Clearly, Congress recognized that for the

[19] Similarly, the Commission suggests extending 272 obligations to affiliates that are "engaged in local exchange activities" (272 Notice, ¶ 79) and those affiliates in which a BOC "places its local exchange operations" (272 Notice, ¶ 33). In both instances, the Commission substitutes vague language in place of the clearer statutory requirements. If this language is intended to reach beyond successors and assigns of the BOC operating as a LEC, then they go beyond the statutory mandate and must be rejected.

[20] 47 U.S.C. § 272(g)(1).

[21] 47 U.S.C. § 272(g)(2).

[22] 47 U.S.C. § 272(g)(3).

BOCs to effectively compete, they must be able to offer the one-stop shopping packages of local and long distance services offered by their rivals.

Despite this express statutory language, the notice nonetheless asks whether "it is necessary to require a BOC and its affiliate to jointly contract to an outside marketing entity for joint marketing of interLATA and local exchange service."[23] The answer is simple. Imposing such a requirement would effectively abrogate the rights granted in section 272(g) and would violate the Act.

Nor does section 272(b)(5), which is the only provision cited as a possible basis for such a restriction, permit a different conclusion. On the contrary, that provision merely requires that all transactions between a BOC and its long distance affiliate must be on an "arms-length basis" with written terms available for public inspection. Nothing in section 272(b)(5), however, limits the permissible scope of any transactions between the BOC and its affiliate. It only regulates the terms of the arrangement. Given the statutory language, there is no legitimate basis for the Commission to adopt any restrictions on the right to offer packaged services.

V. The Commission Should Not Shift the Usual Burden of Proof To Presume That BOCs Are Guilty Until Proven Innocent in Section 271 Complaint Proceedings.

One area where the Commission is authorized to establish procedures is in setting the process for complaints under section 271(d)(6). The Commission appropriately views its goal as attempting to "ensure a full and fair resolution within the 90 day statutory window."[24] The Commission suggests that complaints could be processed more efficiently by shifting the burden

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23 272 Notice, ¶ 92.

24 272 Notice, ¶ 99.

of proof to the BOCs, but this misses the real impact of such a shift. Although the Commission recognizes that frivolous complaints are a problem today,[25] it fails to recognize that shifting the burden of proof will dramatically exacerbate that problem. Once it is clear that a BOC will be presumed guilty unless it can prove itself innocent, competitors would line up for blocks with frivolous complaints that the FCC must resolve within ninety days. The result would be less, rather than more, efficient proceedings with an ever increasing portion of frivolous complaints being upheld because of diminished resources at the BOCs and at the Commission.

Moreover, there is no reason to shift the burden. Before a BOC can receive initial approval under section 271, it has the burden to prove that it meets the 271 standards. The proceeding establishing that will be a matter of public record. Once a company has met that burden, it is reasonable to require a challenger to show that there have been sufficient changes that the BOC is no longer in compliance with the rules.[26] It would be unreasonable to expect the BOC to continually reprove the same case in the face of new complaints. Instead, a party with a complaint should have to show specifically how a BOC now fails to meet the section 271 standards.

The Notice suggests that the shift in burden is necessary to compel the release of information within the control of the BOC, but at the same time the Notice recognizes that the Commission already has the authority in a standard complaint proceeding to compel a defendant

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[25] *See* 272 Notice, ¶ 100, n.178

[26] As with existing complaints, a ***prima facie*** case will vary with each factual context, but at a minimum must set out the factual predicate for a conclusion that specific requirements for long distance approval are no longer being met.

to produce information.[27] It can exercise that same authority here. In a standard complaint proceeding, there is no shift in the burden regardless of who has the information, and there is no reason to change that rule here.

For complaints alleging a violation of the section 272 non-discrimination provisions there is also no basis for a change from existing practice. Like any other case, the complaining party should have the burden to prove discrimination. As with complaints under Section 202, however, once a complaining party has proven discrimination, the burden should fall upon the defendant to show that such discrimination is reasonable. This limited shift of burden, unlike the wholesale shift of burden suggested in the Notice, provides no incentive to file frivolous complaints but will still allow complainants to redress legitimate grievances.

VI. Bell Companies' New Long Distance Service Will Be a Nondominant Entrant in a Nationwide Market.

The Commission should promptly declare the interLATA services offered by Bell companies long distance affiliates to be nondominant. Because those affiliates must compete in a national market, the Commission should not try to divide that market for purposes of evaluating market power. Regardless of market definition, however, the Bell company affiliates will be new entrants that must draw customers from established incumbents. Because they will have no market power, there is no basis and no need to regulate the Bell companies as dominant long distance carriers.

[27] 272 Notice, ¶ 101, n.180.

A. The Market for Long Distance Service is Nationwide.

Economists, the Commission and even AT&T have recognized that the "interstate, domestic, interexchange [market] comprise[s] a single relevant product market with no relevant submarkets."[28] In particular, there is "a single national relevant geographic market."[29] The Commission has relied on this economic truth for more than fifteen years. This single market definition was an underpinning to the Commission's evaluation of AT&T's potential market dominance,[30] and the Commission has proposed to rely on this definition on a going forward basis.[31]

The entry of the Bell companies will not change the unitary nature of this market. Even if such entry could alter the scope of the market, which it cannot, that market certainly cannot have been fractured by the mere potential of Bell company entry -- the point at which the Commission must make its evaluation today. Nevertheless, the Commission proposes to divide the market and "evaluate a BOC's point to point markets in which calls originate in-region separately from its point-to-point markets in which calls originate out-of-region."[32]

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28 ***Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor***, 95 F.C.C.2d 554, 564 (1983) ("Fourth Report and Order"), ***vacated on other grounds, AT&T v. FCC***, 978 F.2d 727 (D.C. Cir. 1992)

29 Fourth Report and Order, at 574.

30 ***Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier***, 11 FCC Rcd 3271, 3276 (1995) ("AT&T Nondominance Order").

31 ***Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking***, CC Docket No. 96-61, ¶ 40 (rel. Mar. 25, 1996).

32 272 Notice, ¶ 126.

As recognized by AT&T, the Commission's effort to alter the geographic scope of the market is "inconsistent with settled principles of market definition."[33] The Commission suggests that "at its most fundamental level, interexchange calling involves a customer making a connection from a specific location to another specific location."[34] Rather than point to point, as suggested by the Commission, the logic offered by the Commission would require dividing the market into billions of individual customer to customer connections. But this more elementary dissection of the market only points out the fundamental flaw in the Commission's proposed policy change. Customers do not make their purchasing decisions based on individual customer pair rates any more than they make them on individual city pair rates. Customers purchase national service, and evaluate the market on that basis.

The entry of the Bell companies into the long distance market creates no "special circumstance"[35] to change the analysis. The Act requires geographic rate averaging, which guarantees that prices in one state will be "no higher than the rates charged" in any other state.[36] As a result, regardless of market power, the Bell companies could not force prices up for isolated point to point connections or even for regions of the country.

Although the Commission worries that this legal protection may be inadequate, it cannot ignore the more fundamental market-based protection. Incumbent interexchange carriers'

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33 ***Policy and Rules Concerning the Interstate, Interexchange Marketplace***, CC Docket No. 96-61, AT&T Comments at i (filed Apr. 19, 1996).

34 272 Notice, ¶ 123.

35 272 Notice, ¶ 125.

36 47 U.S.C. § 254(g).

networks are sufficiently robust -- both in terms of capacity and the ability to apply that capacity to remote locations -- to offer additional competition wherever a geographic rate imbalance were to occur. As Dr. Robert Crandall has explained:

> Because most customers want to be able to reach other subscribers throughout the country, most facilities-based IX carriers have built national networks that are capable of reaching all other telephone lines in the country. If any carrier were to attempt to raise rates on any given route or in any given region, other carriers would be able to respond by offering lower rates through their networks.[37]

The entry of the Bell companies can do nothing to change those physical and market realities. As a result, there can be no basis to deviate from evaluation of market power based on the existing national market.

B. Bell Companies Should Enter the Long Distance Market Regulated As Nondominant Service Providers.

Regardless of market definition, the Bell companies must be considered non-dominant as the new entrants into the long distance market. The Commission has already found that AT&T, with the most customers, the largest network, the most capital, and the most minutes of use is not a dominant provider. It would defy reason to declare that the Bell companies, as new entrants with no customers, should go into the market regulated as dominant carriers.[38]

The Commission acknowledges the obvious truth that with a "zero market share," a

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[37] Affidavit of Robert W. Crandall at ¶ 4, attached to ***Policy and Rules Concerning the Interstate, Interexchange Marketplace***, CC Docket No. 96-61, Bell Atlantic Reply Comments on Sections IV, V and VI (filed May 3, 1996).

[38] While there is always a theoretical possibility that ***any*** carrier could achieve dominant status at some future point in time, that cannot be a basis to regulate that carrier as dominant today.

BOC affiliate, at least initially, "will not be able profitably to raise and sustain its price by restricting its output."[39] Indeed, the structure of the market prevents BOCs from imposing prices above competitive levels at any time. The three largest incumbents spend hundreds of millions of dollars a year on advertising and have considerable name recognition.[40] In fact, more than a decade after divestiture, a sizable portion of BOC customers still believe that AT&T provides their ***local*** service, in addition to long distance.[41]

Moreover, the Commission has already recognized that "AT&T's competitors have enough readily available excess capacity to constrain AT&T's pricing behavior."[42] That capacity, combined with that of AT&T -- which has the largest network in the country -- is certainly enough to restrain a new BOC affiliated competitor. There is simply no way for a BOC to achieve dominance in the long distance market in the foreseeable future.

Nonetheless, the Commission asks whether the BOCs' status as local exchange incumbents providing access service to their long distance e competitors should somehow change the analysis. The answer is no. As an initial matter, any concern that the BOCs might exercise market power over the market for an essential input goes only to whether the ***input*** should

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[39] 272 Notice, ¶ 133.

[40] As of May 1996, AT&T, MCI and Sprint have spent over $369 million on advertising for just the first five months of the year. (***Competitrack***, Volume II - Issue 5, May 1996).

[41] According to ***Financial World***, some 30% to 60% of consumers still think that AT&T is their local phone company. (***Financial World*** at 38, Apr. 22, 1996).

[42] AT&T Nondominance Order at 3303, n.165 (citing First Interexchange Competition Order, 6 FCC Rcd at 5888).

continue to be subject to regulatory oversight. It has nothing to do with the way BOCs long distance service is regulated.

In addition, the Commission raises three specific theoretical concerns over potential BOC power in the long distance market: predation, cross subsidy, and discrimination. None of these, however, is a legitimate practical concern.

The Commission itself recognizes that there can be no predation concern. It simply defies economic sense to expect any of the BOC affiliates to drive AT&T, MCI or Sprint from the long distance market. And, as understood by the Commission, even if that were to happen, the incumbents' networks would "remain intact, ready for another firm to buy the capacity at a distress sale and immediately undercut the [affiliate's] noncompetitive prices."[43]

Likewise, there similarly can be no concern with cross subsidy. First, cross subsidy makes no economic sense. All of the BOCs operate under price cap regulation, and the vast majority are subject to price caps without a sharing component.[44] Because price caps sever the connection between regulated accounting costs and prices, cross subsidy is both pointless and impossible.[45] Moreover, without a realistic possibility to eventually drive out rivals in the long

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43 272 Notice, ¶ 137 (quoting Daniel F. Spulber, ***Deregulating Telecommunications***, 12 Yale J. on Reg. 25, 60 (1995)).

44 In its ongoing review of price cap regulation, the Commission has the opportunity to eliminate the sharing option. Ironically, such a move has been supported by the BOCs, and opposed by the incumbent IX carriers. ***See, e.g., Price Cap Performance Review for Local Exchange Carriers***, CC Docket No. 94-1, Comments of AT&T Corp. at 36-39 (filed Jan. 11, 1996). These positions suggest that IX incumbents perceive more opportunity in arguing the perils of theoretical cross subsidy in other regulatory proceedings, than they see in working to modify regulations to eliminate such concerns.

45 ***See*** Taylor Affidavit, ¶ 28.

distance market, there is no point in a price cap company cross-subsidizing long distance service. Second, BOCs and their affiliates lack the ability to cross-subsidize. In the initial years of long distance service, BOCs must offer long distance through a separate affiliate, with any transactions with the BOC subject to audit. As a result, the FCC would be sure to detect any BOC irrational enough to attempt to cross-subsidize. And in addition, while unnecessary under price caps, the Commission has cost allocation rules that provide redundant protection against cross subsidy.

Discrimination is also not a legitimate source of concern. Section 272 clearly forbids such conduct. Any access or other service provided by the BOC to the affiliate must be based on a tariff or other publicly available writing and all intra- or interLATA services must be offered to other carriers on the same terms and conditions.[46] Moreover, even after entry into long distance, a BOC would still be subject to equal access rules. In order for the BOC to successfully discriminate, it would have to do so in such a manner that it would be noticeable to its customers (otherwise it could have no impact on purchasing decisions), and at the same time be imperceptible to regulators or competitors (or the BOC would risk a section 271(d) enforcement action that could result in suspension or revocation of the right to participate in the long distance market in-region).

Moreover, BOCs would also be restrained by the threat of increased competition for local service. BOC affiliates will not even be authorized to begin competing for in region long distance customers until the BOC has opened its local market by meeting the competitive

[46] 47 U.S.C. § 272(b)(5) and (e)(4).

checklist required under section 271. As a result, any effort by the BOC to degrade or otherwise encumber its own local access service to any carrier customer runs the significant risk of that carrier customer avoiding access by moving to self-supply or purchasing unbundled facilities. In other words, the BOCs have far more to lose on the local side by unlawfully discriminating than they stand to gain on the long distance side.

It is not mere conjecture that the BOCs will not impede a competitive market. On the contrary, in each of the businesses that the Bell companies have been allowed to enter since divestiture, output has grown, prices have fallen and competitors have thrived. BOCs have a long history of operating in other markets dependent on their local service without any adverse economic affects. BOCs participate in a thriving cellular market that is growing at 40% a year,[47] but with BOC average market share not exceeding 50%.[48] Moreover, cellular prices are actually lower where an in-region BOC is a provider of cellular service.[49] In the voice messaging market, independent national providers experienced a four-fold increase in revenues between 1990 and 1994, despite the entry of the BOCs in 1988.[50] At the same time prices have fallen by 50-83%.[51] In the unregulated market for customer premises equipment, the BOCs collectively have only 15 percent of PBX sales and less than 9 percent of key/hybrid telephone sales, or an average of

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[47] ***See, U.S. Wireless Survey Results***, CTIA Release, Mar. 25, 1996.

[48] ***See*** Affidavit of Robert W. Crandall, ¶ 12, attached to ***Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services***, CC Docket No. 96-21, Bell Atlantic Comments (filed Mar. 13, 1996) ("Crandall 96-21 Affidavit").

[49] Affidavit of Jerry A. Hausman, ¶ 29, attached to Comments of United States Telephone Association (filed Aug. 15, 1996).

[50] Crandall 96-21 Affidavit, ¶ 13.

[51] Taylor Affidavit, ¶ 34.

slightly more than 1 and 2 percent respectively.[52] Finally, in the limited interLATA corridors that Bell Atlantic has been allowed to offer service, despite the claimed advantage provided by its status as a local service provider, Bell Atlantic's long distance service has less than 10 percent of the customers and less than 20 percent of revenues.[53] At the same time, Bell Atlantic has dropped its prices to the point where they are 25-33 percent below its largest competitors.[54]

Moreover, dominant carrier regulation of BOC long distance services is not only unnecessary, but would not address any of the concerns raised in the Notice. On the contrary, the sole effect of classifying the BOCs as dominant is that the expected benefit of increased long distance competition would be diminished to the ultimate detriment of consumers. Requiring BOCs to go through drawn-out tariff proceedings and provide lengthy advanced notice of price changes and new service offerings would merely discourage price competition and the introduction of new services.[55] The Commission, appellate courts and the Supreme Court all

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52 Crandall 96-21 Affidavit, ¶ 13.

53 ***Petition to Regulate Bell Atlantic as a Nondominant Provider of Interstate InterLATA Corridor Service***, DA 95-1666, Petition at 7 (filed July 7, 1995) ("Corridor Petition").

54 Declaration of Robin A. Lewis-Ivy, ¶ 8, attached to Corridor Petition.

55 Taylor Affidavit, ¶¶ 12, 25.

have cautioned against the competitive harm associated with a requiring carriers to signal price changes through advanced tariff filings.[56]

Finally, the notice asks whether the prospect of mergers between BOCs should have any impact on whether or not the BOCs are treated as nondominant. The answer is no. The simple fact is that both parties to such a merger would be entering the nationwide long distance market as new entrants with a zero market share, and will do so in competition with well established incumbents. As a result, there can be no concern that the merged company could somehow exercise market power in long distance. Nor, contrary to the speculation in the Notice (¶ 40), could such a merger present any greater concerns of discriminatory access to the BOCs' local markets. On the contrary, such a merger would do nothing to change whatever degree of market power the merging companies have over local access in their respective areas, and the merged company's access business would remain subject to all the market and regulatory constraints described above -- constraints that provide abundant protection against discrimination and any other conceivable risk.

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[56] ***See MCI Telecommunications Corp. v. American Telephone and Telegraph***, 114 S. Ct. 2223, 2233 (1994) (voluntarily sharing the very pricing information that the Commission ***requires*** dominant carriers to file could spark enforcement of the antitrust laws absent government compulsion); ***accord Southwestern Bell Corp. v. Federal Communications Commission***, 43 F.3d 1515, 1520 (D.C. Cir. 1995); AT&T Nondominance Order, Separate Statement of Commissioner Susan Ness at 3373 (AT&T tariff requirements functioned "more as hindrances to true rivalry than as consumer safeguards").

Conclusion

The Commission should not impose a superfluous layer of regulation on the Act's non-accounting safeguards in section 272. The Commission should, however, promptly order that the BOCs interLATA affiliates are nondominant carriers.

Respectfully submitted,

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EXHIBIT 1